

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

LUCI BAGS LLC,	§	
	§	Civil Action No. 4:16-cv-377-ALM
Plaintiff,	§	
	§	
v.	§	
	§	
YOUNIQUE, LLC,	§	
	§	
Defendant.	§	

DECLARATION OF REBECCA A. LUCAS

Pursuant to 28 U.S.C. § 1746, I, Rebecca A. Lucas, declare the following statements to be true under the penalties of perjury:

1. I am a resident of Frisco, Texas, am over the age of 18 years, and am fully competent to testify to the matters in this Declaration.

2. The Declaration is based on my personal knowledge. If called to do so, I would and could testify to the matters stated herein.

3. I am the founder and President of Luci Bags LLC (hereinafter, "Luci Bags"). I founded Luci Bags in 2008 and have since been solely responsible for its management and operations.

4. As a result of my work and experience designing and constructing bags for Luci Bags and my examination and exposure to other similar bags utilized by direct sales presenters, I have become an expert in the design, construction and materials used to create "display" bags or bags that have external clear or PVC pockets.

5. Luci Bags' Original Tote bags are designed to allow individuals, and particularly people engaged in direct sales, to display small items (like jewelry and cosmetics), photographs, catalogs and other material utilized in the direct sales market. When I first designed the Original Display Tote, I intended that the large pocket be capable of storing and/or displaying product

catalogs. Although the large pocket can accommodate an 8x10 inch photograph, it was not designed for that purpose.

6. On occasion, Luci Bags has advertised the features of its Original Display tote for the use of displaying photographs. The majority of Luci Bags advertising, however, advertises the feature of displaying small items, particularly those sold by direct-saleswomen. Luci Bags' advertisements showing the display of photographs typically advertise the features of the Original Display tote for displaying photographs of items that are available for sale, but which cannot be physically carried, such as baked goods or houses. Although Luci Bags has marketed the Luci Bag for displaying personal photographs, these campaigns have been relatively unsuccessful and most Luci Bags consumers do not purchase our display totes for this purpose.

7. The trade dress registered under Trademark Registration No. 4,943,935 does not include the manner, means or materials used to construct display tote bags, the size of the tote bags, or the size and configuration of the external pockets.

8. When I first designed the Original Display Tote, I included the accent stripes for aesthetic purposes only as non-essential flourishes that would decorate and distinguish the tote bags. While the stripes do, in fact, cover the seams created by sewing the PVC plastic to the zipper tape—the fabric component of the zipper—I did not include the accent stripes for the purposes of covering these seams.

9. Zippers are comprised of multiple parts. The teeth make up the chain, which is the continuous piece that is formed when both halves of the zipper are meshed together. A slider is moved up and down the chain to open or close the zipper. Typically, a zipper will have some sort of pull tab to facilitate the movement of the slider. The teeth are affixed to tape—a band of fabric—on each side of the zipper. The tape is used as the connection point between the zipper

and the item on which it is to be sewn. Zippers and zipper tape come in multiple colors and sizes. The band of a zipper tape may be narrow or wide.

10. There are multiple ways to attach a zipper to a clear or PVC pocket on a handbag that result in a complete and finished looking product that is acceptable for sale to consumers. For example, the PVC or clear material may be folded over and sewn to the front of the zipper tape. Alternatively, the PVC material may be sewn behind the zipper tape, which effectively gives the same outward appearance as the use of bias tape. Although bias tape can be used to cover the seam where the zipper and PVC material were sewn together, it is not necessary to finish the construction of the bag. Adding additional finishing material, such as bias tape, increases the cost of the bag and the construction time.

11. I have reviewed Exs. 2 and 3 to the Rachel Nasvik Declaration. The images shown in these exhibits do not demonstrate that bias tape is necessary for the construction of display totes or that bias tape or other finishers are required to be utilized in the configuration in Luci Bags trade dress. Many of the bags included do not contain clear external pockets and/or zippers and do not appear to have any relevance to the issue of construction of external display pockets with zippers. For example, the bags on Page 92-94 do not have a zipper and instead uses bias tape or similar material to create the entire pocket itself.

12. To the extent that the bags contain external pockets and zippers, many of the images confirm that it is possible and commercially acceptable to sew the zipper tape directly to the PVC or clear material that comprises an external pocket. For example, on the Aroma2Go Presentation Tote Carry Bag found on pages 53-54 of the Nasvik Report, the external pocket found at the bottom of the bag does not appear to utilize bias tape to connect the zipper tape to the clear material. Although bias tape is utilized for the top pocket, it is located both above and

below the zipper in contrast to the Luci Bag which only has an accent stripe below the zipper of its upper pockets. The bags found on Pages 139-41 created by BHipBags also show the zipper tape sewn directly to the PVC material. Several of the bags identified in Exhibit 3 to the Nasvik Report also show clear bags that have the zipper tape sewn directly to the PVC material. The Top right and bottom photographs on page 242 of the report do not appear to utilize bias tape but zippers with wide tape. On page 243, both bags appear to show the PVC sewn directly to the zipper tape. The photographs on pages 244 through 250 do not show bags with clear external pockets nor bags with stripes in the configuration covered by Luci Bags' trade dress.

13. Similarly, the tote bags sold by Trendytotesbydeb also show that a finished, commercially acceptable product can be made by sewing the zipper tape directly to the clear material, as shown on pages 67-68, 76-91, 95-133, 159-64 of the Nasvik Report. Although some of her totes may have utilized bias tape or other trim (although it is difficult to tell from the photographs), after close inspection of the images provided in the Nasvik Report many, if not most, appear to have the zipper tape sewn directly to the PVC material. For example, the first image on page 77 does not appear to use bias tape to attach the zipper tape to the PVC material; although the pictures are difficult to make out, it also appears as if bias tape is not used on the first tote bag on page 82. In addition, it is worth noting that Luci Bags previously asked Etsy and Trendytotesbydeb to remove listing and bags that infringe on Luci Bags' trade dress, which include the few images of her tote bags that utilize bias tape, such as the first tote on page 89; to my knowledge, none of Trendytotesbydeb's current listings infringe on the Luci Bags trade dress. Luci Bags does not believe that any of the photographs of Trendytotesbydeb bags obtained recently and cited in the Nasvik Report are infringing. Display bags that have the appearance of a

stripe by the zipper are not considered to be infringing if the stripe is created by the zipper band itself and not additional material.

14. I am also familiar with the tote bag sold by Lucky7Bags found on pages 65-66 of the Nasvik Report. Lucky7Bags external pockets are removable and interchangeable, as such bias tape, is used to create all edges of the pocket itself. Moreover, this tote bag does not infringe Luci Bag's trade dress.

15. Some of the other bags referenced in the Nasvik Report do utilize bias tape or other trim, but many of the photos are of poor quality and it is difficult to discern precisely how they bags therein are constructed. For example, it is not possible to tell the manner of construction or even the manufacturer of the bags which appear on pages 74-75. Moreover, none of the other bags that did or may have utilized bias tape or trim infringed on the Luci Bags trade dress.

16. It is my opinion as a designer and marketer of display tote bags that it is not necessary to use bias tape or other material to cover the seams created by sewing the PVC or other clear material to the zipper tape. Bags that do not incorporate bias tape or other material to the zipper tape still appear finished, are not inferior to bags created with such finishings, and are commercially acceptable within the display tote market.

17. In addition to the bag designs found in the Nasvik Report that show that attaching the zipper directly to the PVC without the addition of bias tape or other material to cover the seam is commercially acceptable, I conducted additional research and located several other bags that demonstrate this fact. For example, bags for sale at www.theclearbagstore.com include bags without bias tape:



This Stella & Dot bag also shows PVC material attached to the zipper tape without bias tape or other trim:



Similarly, this Victoria Secret bag has PVC material that is printed to have a stripe sewn directly to the zipper without bias tape:



There are many more bags that similarly do not utilize trim or bias tape, yet sew the zipper directly to the clear or PVC material that look “finished” and are commercially acceptable.

18. Luci Bags trade dress does not include the use of bias tape or the method of construction of a display tote bag. The trade dress is limited to the configuration of stripes adjacent to the zippers. Luci Bags trade dress does not limit other display bag manufacturers from utilizing bias tape or the same configuration of pockets. Instead it limits the use material distinct from the zipper (and the zipper band) or the tote itself in such a way that it visually creates the appearance of stripes in the trade dress configuration.

19. The stripes covered under Luci Bags trade dress are not related to the zipper except with respect to their location adjacent to the zippers. The “contrast” created by the stripe is not and has not been considered with respect to the color of the zipper. Instead, the trade dress protects the use of additional material, other than the zipper and zipper band, that creates the

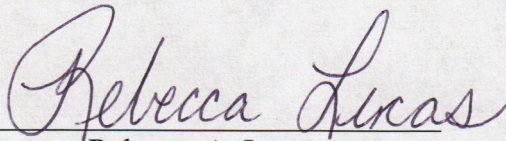
visual appearance of a stripe by contrasting either the color of the tote bag itself or the material of the tote bag itself. A clear contrast is created when materials are added to the bag in the configuration identified in Luci Bags' trade dress that differ from the color of the material that makes up the tote bag itself. Likewise, a similar contrast would be created with material that was the same color as the tote bag, but visually distinct, such as patent or embossed leather or fabric that had metallic threads interspersed.

20. In fact, Luci Bags has not always used a black zipper in the construction of its bags, or even a zipper that contrasted in color from the accent stripe. When Luci Bags started commercial manufacture of its bags, it switched to the use of a black zipper for all of its bags. This decision was made because specialty, colored zippers—such as those that would match the accent colors on Luci Bags totes—are extremely expensive. At the quantity of bags manufactured for Luci Bags, the only commercially viable option was a black zipper. The use of other colors, or varying the colors for each print, would be prohibitively expensive and most manufacturing plants at this scale do not offer options other than black. Prior to outsourcing the manufacturing of Luci Bags, the zippers used were the same color as the accent stripe. Luci Bags never considered the contrast or lack thereof with the pocket zipper to be a component of its trade dress.

21. In my opinion and experience, there are multiple ways to create a commercially acceptable and desirable display tote without utilizing the Luci Bag trade dress. As stated above, the zipper could be sewn directly to the PVC or clear pocket material without using bias tape or trim to cover the seam. A bag could utilize contrasting stripes but in a different configuration, such as: two rows of pockets in the back instead of one large pocket, three rows of pockets on the front instead of two, individual pockets with separate zippers, etc. If a display bag tote designer

wished to utilize the same pocket configuration found in the Luci Bag tote, they could include an additional stripe above the large pocket zipper and/or the top pocket zipper or use “finishing” material, like bias tape or fabric trim, that was identical to and did not contrast with the adjacent color or pattern of the tote bag itself. None of these design changes would affect the functionality of the display tote bag in being able to store and display items and images through external pockets. Likewise, it is unlikely that there would be any appreciable additional costs in utilizing any of these alternative designs; indeed, not using a finishing product like bias tape or trim would reduce the cost of production.

Executed on June 9, 2017


Rebecca A. Lucas